

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

Judges: William B. Murphy, Richard Allen Griffin and Helene N. White

CITY OF TAYLOR

Plaintiff/Appellee,

V

THE DETROIT EDISON COMPANY

Defendant/Appellant.

Supreme Court No. 127580

Court of Appeals No. 250648

Wayne County Circuit Court
Case No. 02-221723-CZ

SUPPLEMENTAL BRIEF ON APPEAL -
APPELLANT THE DETROIT EDISON COMPANY

*** * * ORAL ARGUMENT REQUESTED * * ***

Bruce R. Maters (P28080)
George H. Hathaway (P31448)
The Detroit Edison Company
2000 Second Avenue, #688 WCB
Detroit, MI 48226
(313) 235-8958

William K. Fahey (P27745)
Stephen J. Rhodes (P40112)
FOSTER, SWIFT, COLLINS & SMITH, P.C.
Attorneys for Defendant/Appellant
The Detroit Edison Company
313 South Washington Square
Lansing, MI 48933-2193
(517) 371-8100

Dated: February 21, 2006

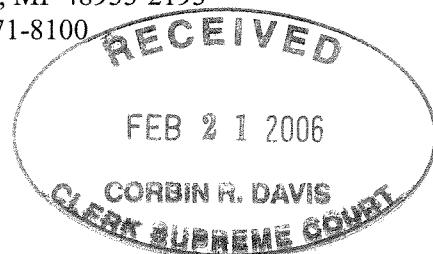


TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

INTRODUCTION..... 1

ARGUMENT 1

I. THE DETERMINATION OF WHO PAYS TO REPLACE EXISTING
OVERHEAD FACILITIES WITH UNDERGROUND FACILITIES IS NOT A
MATTER OF LOCAL CONTROL OVER STREETS, BUT INSTEAD IS A
MATTER OF UTILITY REGULATION UNDER STATE LAW..... 1

CONCLUSION AND RELIEF 7

INDEX OF AUTHORITIES

Cases

City of Allen v Public Utility Comm, 161 SW3d 195, 206-207, 209 (Tex App, 2005)..... 3

Other Authorities

Mich Const 1963, art 7, § 21..... 1

Mich Const 1963, art 7, § 22..... 1

Mich Const 1963, art 7, § 29..... 1

MPSC Rule 460.516(1)(27a) 2

INTRODUCTION

The Detroit Edison Company ("Edison") offers this supplemental brief responding to the Michigan Municipal League and Michigan Townships Association's ("MML/MTA") proposed amicus curiae brief. Edison's primary position is that MML/MTA's motion to file amicus curiae brief should be denied, and that the Court should not consider that brief. In the event that the Court grants that motion, however, Edison submits the following reply. Edison relies on its initial brief and reply brief, which addressed the issues in detail. Edison's avoidance of repetition by not addressing all of MML/MTA's arguments should not be deemed to constitute an acceptance of any of those arguments.

ARGUMENT

I. THE DETERMINATION OF WHO PAYS TO REPLACE EXISTING OVERHEAD FACILITIES WITH UNDERGROUND FACILITIES IS NOT A MATTER OF LOCAL CONTROL OVER STREETS, BUT INSTEAD IS A MATTER OF UTILITY REGULATION UNDER STATE LAW.

MML/MTA misunderstand the fundamental constitutional tenet that cities are legislative creations and are ultimately subject to state law. Mich Const 1963, art 7, § 21 provides that "[the] legislature shall provide by general laws for the incorporation of cities and villages." Mich Const 1963, art 7, § 22 states: "Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property, and government, subject to the constitution and law." Mich Const 1963, art 7, § 29, on which MML/MTA rely for the claimed constitutional powers of cities, states: "Except as otherwise provided in this constitution, the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government." (emphasis added). Thus, when a city attempts to effectuate its "reasonable control" over streets by enacting an ordinance, as the City of Taylor ("City") did in this case, it can only do so "subject to . . . law."

MML/MTA inaccurately contend that Edison is trying to change the law. To the contrary, this case involves constitutional language that is nearly 100 years old. The Michigan Public Service Commission ("MPSC") issued its Electric Rules Order and adopted the controlling law (its rules) in 1970 (18a-27a). The present Tariff provisions were issued pursuant to MPSC orders in 1976 and 1990 (28a-45a; see Edison's initial brief, pp 22-23, n 14). The MPSC's cost-allocation rules are well-known, and have worked well, for decades. For example, the MPSC's August 10, 1970 Electric Rules Order describes the MPSC's public hearing process, including **"Notice was sent to an official of all municipalities within the state, to all electric and telephone utilities, and to all other parties who had evidenced an interest in the matter"** (18a, emphasis added).

Thirty years after the MPSC enacted its cost-allocation rules, Edison advised the City of the well-established and well-reasoned rules. In response, the City enacted a May 16, 2000 Ordinance (123a) that purports to shift the cost of underground utility replacements from the City to utilities. The City's Ordinance is a prototype for radical (and unlawful) self-empowerment by municipalities. MML/MTA now join the City in an attempt to change the law and apply that change throughout Michigan. Compare, for example, the organization, headings and language of the City's ordinance (116a-122a) with the City of East Grand Rapids' Ordinance, attached to MML/MTA's brief.

In an attempt to vilify Edison and its supporting amici curiae (or perhaps to gain sympathy for their own position) MML/MTA assert that there is an effort to take power away from municipalities. In reality, Edison has worked with municipalities for decades. Edison does not dispute that the City (and other municipalities) may decide to have underground facilities. Edison regularly (subject to safety and other applicable considerations) works with such underground replacement requests. Underground utility replacements are also anticipated and expressly allowed under MPSC Rule 460.516(1)(27a), and the applicable Tariff (47a, 52a, 58a). The dispute in this appeal concerns who

must pay for the cost of the City's underground utility replacement. Under the MPSC Rules and Tariff, the City must pay. The MPSC in its Electric Rules Order determined that utilities and their ratepayers should not bear the costs caused by those who want underground facilities for their own benefit, but rather the cost-causers must pay for those costs (19a-20a).

The MPSC's Rules and Tariff provisions establish what is reasonable, and bind both Edison and the City. Edison installed standard overhead facilities in the City, and its ratepayers paid for those facilities. The City can decide to remove those facilities and replace them with underground facilities; however, pursuant to the controlling MPSC Rules and Tariff, the City cannot force Edison and its ratepayers to pay for this expensive and duplicative project. See, City of Allen v Public Utility Comm, 161 SW3d 195, 206-207, 209 (Tex App, 2005) (rejecting municipality's purported exercise of police power to reduce the amount of compensation that a utility would recover for an underground installation to zero, and shifting that expense to the utility's customers).

MML/MTA argue that the MPSC rules and tariffs should not apply to the City because the City is not a true "customer," or because the City is not acting in its capacity as a "customer" when it requires the replacement of lines underground (brief, pp14-16). There is no dispute that the City is a substantial Edison customer for purposes of both street lighting and the powering of traffic control devices along Telegraph, as well as elsewhere in the City. In mandating the underground replacement of lines, the City purports to act not only on its own behalf as a customer, but also in a representative capacity of other customers along Telegraph and throughout the City. Nothing in the MPSC rules and tariffs indicates an intent to exclude "governmental customers" from the "require[ment] to pay the utility" for the additional cost of underground replacements. Rule 460.516 (27a). Tariff Section B-3.4(5)(a)(1) further clarifies this point by explicitly stating: "Where overhead lines . . . are objected to by a person or a municipality . . . [the] objecting party shall be

responsible for the payment of the additional cost of the underground facilities.” (52a; emphasis added). Tariff Section B-3.6(3)(b)(3) also excepts Edison from paying any relocation costs when the “facilities provide public service such as lighting, traffic signals, etc.” (58a). All of these provisions expressly contemplate that “municipal customers” are required to pay the additional cost when they request the underground replacement of utility facilities.

MML/MTA seem to acknowledge that municipal control over streets is limited to matters of local concern, but assert that Edison does not address local concerns regarding the placement of utility facilities (brief, pp 8-9). As Edison has previously indicated, it does not dispute (subject to safety and engineering considerations), a municipality's ability to decide to have underground utility facilities. The issue is who must pay for them. A municipality has no legitimate "local concern" in making Edison and its ratepayers pay for a municipal decision to remove properly-located, well functioning utility facilities and replace them with duplicative facilities.

There is no merit in MML/MTA's contention that the "industry" is seeking "blanket immunity" that would preclude local regulation in other areas (brief, pp 19-20). It is unclear what other regulation MML/MTA have in mind. Plainly, however, Edison and the amici curiae supporting Edison's position did not cause this litigation. Instead, the City enacted a self-serving Ordinance contrary to the MPSC's cost-allocation rules, and then sued Edison to enforce that ordinance. Edison is simply defending the MPSC's well-established and well-reasoned cost allocation rules. Moreover, if the City's ordinance were as innocuous as MML/MTA suggest, then that ordinance would not be used as the basis for other ordinances, such as ordinance that the City of East Grand Rapids enacted (attached to MML/MTA's brief).

MML/MTA's related assertion (brief, p 18) that the MPSC is "too closely aligned with utilities and their industries" to decide these types of cases lacks merit, and ignores the well-

established primary jurisdiction doctrine (see Edison's initial brief, pp 36-49). The Court is also undoubtedly aware of countless cases involving disagreements between the MPSC and utilities. The MPSC is the State agency with the specialized expertise and broad experience to decide cases like this. The real danger is what has happened here - where a local court issued an aberrant decision subsidizing a local project, and now municipalities across this State want to obtain similar subsidies at the expense of utility ratepayers and to the detriment of State interests.

In tacit recognition that the City advocates radical change that cannot withstand reasoned review, MML/MTA offer two "fall-back" positions. First, they present a City of East Grand Rapids Ordinance concerning overhead relocation of electric facilities (instead of underground replacement). Edison declines to comment specifically, since the City of East Grand Rapids is not in its service territory, but instead is in Consumers Energy Company's ("Consumers") service territory. Edison does not purport to speak on behalf of Consumers. As a general proposition, however, if there is room in the right-of-way, then Edison may place its facilities there, in accordance with engineering and safety standards. If there is no room in the right-of-way, (e.g. because the right-of-way is no longer there, or otherwise not physically usable), then Edison removes its facilities. To the extent Edison needs to provide service to its customers, Edison installs facilities in accordance with safety and engineering standards. All these things are done at Edison's expense and in recognition of a municipality's "reasonable" control over its streets pursuant to the established law. There is no merit in MML/MTA's attempt to change that law to allow municipalities to dictate management decisions to utilities, and shift additional, self-created costs from themselves to utilities and their ratepayers.

There is also no merit in MML/MTA's suggestion that Edison should make a "contribution" to the City's "overall public improvement project cost" (brief, p 24). There is no requirement for a utility to pay for part of a municipality's public improvement project. While "reasonable control" of

streets may include the power to decide to improve them, it does not include the power to make a utility pay for the improvement(s). Interestingly, MML/MTA's suggestion also acknowledges that municipalities must pay for their own public improvement projects, and offers no explanation for their contention that utilities and ratepayers should be uniquely compelled to make massive "contributions" to those local projects.

MML/MTA's second fall-back argument is their suggestion to narrow the Court of Appeals decision to just allow cost shifting with respect to major public improvement projects. This is basically the same improper change in the law, but with the promise of fewer additional cases. Of course, the MML's 511 cities and villages, and the MTA's 1,235 townships would not be lined-up behind their proposed alternative if they did not expect it to open the floodgates for subsidized public improvement projects on the backs of Michigan's utilities and their customers.

MML/MTA essentially ask this Court to look to the past for assurance that municipalities will not institute a flood of utility replacements/relocations (brief, p 22). MML/MTA's attempt to rely on the past as a predictor of the future lacks merit, since MML/MTA seek to radically change the law. To maintain the benefits of the past, the law that produced those benefits, including the MPSC's jurisdiction and cost allocation rules, must be maintained.

MML/MTA suggest that municipalities will be inhibited from requiring utilities to fund future utility replacements because municipalities are "financially strapped" (brief, p 22). The MML/MTA's suggestion is backwards. If municipalities are empowered to fund their wish-lists with private funds, any "lack of public monies" will only increase the likelihood and amount of the municipalities' attempts to subsidize their municipal projects. Moreover, if one municipality (such as the City) can obtain a subsidy, then every municipality in this State (such as the City of East Grand Rapids) would have an incentive to seek its "fair share" of funding from utilities.

No matter how the MML/MTA attempt to repackage this case, their position is still beyond a municipality's "reasonable" control of its streets, or lawful use of the police power. The inescapable fact is that there was nothing defective, dangerous or unsafe with Edison's overhead facilities, which were fully-compliant facilities that were installed in accordance with the well-established, safe, reliable and economical provision of electric service. The City acknowledges that it "raised no issue concerning the adequacy of Edison's equipment, facilities, or services" (brief, p 58). There was not even an arguable reason to move the utility poles (let alone remove and replace them), to make way to install a sewer or move a road. Instead, the City wanted utility facilities in the same location, just underground. A municipality cannot force a utility to bear the cost of abandoning its properly-located, well-functioning system and instead replacing it with a new, duplicative system. It does not matter that a municipality is attempting to improve itself, since such improvements are in no way hindered. A municipality can certainly decide to improve itself and its streets, but it cannot make Edison and its ratepayers pay for those improvements.

CONCLUSION AND RELIEF

Edison has attempted briefly to respond to some of the points that the MML/MTA attempted to inject into this case through their untimely amicus curiae brief. The MML/MTA's filing, in itself, reflects the broad repercussions that can be expected from their proposed change in the law. Edison respectfully asserts that the well-established law (prior to the Court of Appeals decision) should be restored and clarified. The City's "reasonable control" over its streets is limited to matters of local concern and any ordinances to that end are "subject to . . . law." Subject to safety and engineering requirements, Edison does not dispute that the City may lawfully decide to remove overhead utility facilities and replace them with underground facilities. Edison works with such requests, and the MPSC's Rules and Tariff provisions address them, but this case concerns who must pay for the City's


decision. The MPSC has broad authority over the rates, terms and conditions of utility service. Pursuant to this authority, the MPSC sets utility rates based on standard overhead facilities. The MPSC also established Rules and Tariff provisions requiring that those who want a utility to replace overhead facilities with underground facilities must pay for this expensive and duplicative endeavor. The City's reasonable local control does not include the ability to shift its own undergrounding costs to Edison and its customers.

Respectfully submitted,

Bruce R. Maters (P28080)
George H. Hathaway (P31448)
The Detroit Edison Company
2000 Second Avenue, #688 WCB
Detroit, MI 48226
(313) 235-8958

FOSTER, SWIFT, COLLINS & SMITH, P.C.
Attorneys for Appellant The Detroit Edison Company

Dated: February 21, 2006

By: 
William K. Fahey (P27745)
Stephen J. Rhodes (P40112)
313 South Washington Square
Lansing, MI 48933-2193
(517) 371-8100

S:\151\DET-ED\CITYOFTAYLOR\SUPREME\SuppBriefOnAppeal.doc